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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1581

BALTIMORE & OHIO RAILROAD COMPANY and
WESTERN MARYLAND RAILWAY COMPANY,
Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA and
UNITED TRANSPORTATION UNION,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

ROBERT P. KANE, *Attorney General*
KATHLEEN HERZOG LARKIN,
Assistant Attorney General,
Capitol Annex
Harrisburg, Pa. 17120

GORDON P. MacDOUGALL,
Special Assistant Attorney General
1100 17th Street, N.W.
Washington, D.C. 20036

THOMAS P. SHEARER
711 Frick Building
Pittsburgh, Pa. 15219

Attorneys for Commonwealth of Pennsylvania and United Transportation Union

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Pursuant to Rule 16(1) of the Rules of this Court, the Commonwealth of Pennsylvania and the United Transportation Union move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania, on the ground that it does not present a substantial federal question, and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This appeal involves the validity of a 1971 Pennsylvania statute which requires that railroad employees be paid weekly, unless otherwise stipulated in the contract of hiring or in an applicable labor agreement. Prior to 1971, railroad personnel were governed by a 1913 statute, which applies to all industry, and which specifies semi-monthly payment.

The Supreme Court of Pennsylvania sustained the validity of the statute against the challenge of two railroads that the 1971 law contravenes the Railway Labor Act, 45 U.S.C. 151, *et seq.*

We are in general accord with the appellant railroads' statement of the case, insofar as it describes the manner in which this controversy reached this Court[1]:

---

[1] We disagree as to a factual matter. All of the bargaining units involved have *not* been in negotiations relative to wage payments, contrary to the Jurisdictional Statement. (J.S., 4-5). Three of the four bargaining units on the B&O were involved in no negotiations whatsoever, as found by the Hearing Examiner in Findings No. 9, 11, and 13. (J.S., A44-A45). One unit had an agreement requiring 14-day pay periods, as shown in Findings No. 4 and 5 (J.S. A43), but other units were not even members of the Association of General Chairmen, as shown in Findings No. 9, 11 and 13. (J.S., A44-45). With respect to the other appellant, Western Maryland Ry. Co., one bargaining unit had a fully operative bargaining agreement requiring bi-weekly pay (Finding No. 31; J.S., A48), while the other, although involved in some negotiations, was found to have no such agreement (Findings No. 29 & 30; J.S., A47).

ARGUMENT

I

THE APPEAL IS INCONSEQUENTIAL

The issues presented herein reputedly involve questions of federal supremacy and preemption. In reality, the ultimate issue presented is whether a number of railroad workers in Pennsylvania are to receive their wages every 7 days, instead of every 15 days. No amount of semantics can convert this issue into one warranting the attention of this Court.

The frivolity of appellants' appeal is compounded when it is considered that a declaration by this Court to the effect that the Pennsylvania Act of July 14, 1971, P.L. 221, No. 43, P.S. § 255.1 (hereinafter referred to as Act No. 43) is invalid would, by necessary implication, also invalidate the Pennsylvania Act of April 24, 1913, P.L. 114, 43 P.S. § 251 (hereinafter referred to as the Act of 1913). The Act of 1913 (providing for the semi-monthly payment of wages to all employees of the Commonwealth of Pennsylvania) was repealed in part by Act No. 43 (providing for weekly payment of wages to railroad employees).

Act No. 43 has been complied with by all railroads with the exception of the two appellants. The Act of 1913, however, has been complied with by all Pennsylvania employers, including appellants, for over 60 years. Thus, it is difficult, if not impossible, to justify appellants' attack on Act No. 43 on the basis that it is a state legislative enactment, when appellants have apparently been satisfied with the former state legislative enactment for over 60 years. Therefore, appellants' position seems based, in reality, upon dissatisfaction with the distinction between the two statutes – 8 days. To assuage this dissatisfaction, the two railroads would have both enactments declared invalid as to all railroad employees.

II

THIS APPEAL PRESENTS NO SUBSTANTIAL QUESTION OF FEDERAL LAW

The two railroad appellants present two grounds upon which they urge that a state statute should be declared invalid because of the operation and scheme of a federal statute. The first reputed ground urged as a basis for the invalidity of the state statute is that the operation and scheme of the federal statute preclude all state legislation in the same field, even without an actual conflict – *i.e.*, invalidity based upon "preemption" or "supersession". The second reputed ground urged as a basis for the invalidity of the state statute is that an actual conflict exists between the state statute and the federal statute – *i.e.*, invalidity based upon federal "supremacy". Upon neither of these reputed grounds does this appeal present a substantial question of federal law warranting the time or attention of this Court.

A. Preemption.

Justice Roberts correctly stated the test for federal preemption in the Pennsylvania Supreme Court opinion below (J.S., A10):

> "'The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field . . .'." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217 (1963, hereinafter referred to as *Florida Lime*).

The field of operation of the federal statute involved in this appeal is claimed to be the Railway Labor Act. Section 6 of the Railway Labor Act, 45 U.S.C. § 156, provides in pertinent part:

> "Carriers and representatives of the employees shall give at least thirty days written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intedned change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

This Court, upon considering the Railway Labor Act in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co.*, 372 U.S. 284, 289-290 (1963), described the field embraced by the Railway Labor Act as follows:

> "The Railway Labor Act . . . does not undertake governmental regulation of wages, hours, or working conditions. Instead, *it seeks to provide a means*

> *by which agreement may be reached* with respect to them. The national interest . . . is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about working conditions does not reach the point of interfering with interstate commerce." [Emphasis Supplied].

Thus, it is obvious from the wording of the Railway Labor Act, as well as from the interpretation given its express terms by this Court, that the Railway Labor Act is not a "regulatory" enactment in the strict sense of the word, but rather, a *means*, supplying a general framework by which the railroads and their employees can avoid an impasse which might affect interstate commerce. As stated in Justice Pomeroy's dissenting opinion in the Pennsylvania Supreme Court below (J.S., 13):

> ". . . Its purpose is 'to encourage collective bargaining by railroads and their employees in order *to prevent, if possible, wasteful strikes and interruptions* of interstate commerce . . .'. *The Detroit and Toledo Shoreline Company v. United Transportation Union*, 396 U.S. 142, 148, 24 L.Ed.2d 325, 331 (1969). . . ." [Emphasis Added].

Act No. 43, on the other hand, seeks merely to regulate a local social condition – the frequency by which Pennsylvania railroad employees are to receive their wages. Patently, Act No. 43 does not even touch upon the same field circumscribed by the Railway Labor Act.

Nevertheless, these two railroads would urge this Court that the Railway Labor Act preempts Act No. 43. However, such an argument cannot be sustained unless it is presumed: 1) that contrary to the interpretation given the Railway Labor Act in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co., supra*, the Railway Labor Act provides not a *means*, but rather, a system of regulation, and 2) that this presumed regulation provides for the frequency by which railroad workers are to be paid their wages. Not only is this presumption – upon – presumption without a shred of evidence to support it, but such an argument flies into the face of the principle espoused by this Court in *Florida Lime, supra*, at 142:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusions, or that Congress has unmistakenly so ordained."

Thus, when the economic and social welfare of the individual railroad employee depends upon the local and regional economic and social milieu which immediately surrounds him, there is no reason to preempt state jurisdiction in the absence of a direct conflict.

Appellants, however, would not only eschew the clear language of *Florida Lime, supra*, but would assert the doctrine of preemption in the face of the fact that this Court has closely scrutinized the question and has found in unmistakeable terms that there is no preemption where there is no actual conflict.

In *Terminal Ass'n. v. Trainmen*, 318 U.S. 1 (1943), the Supreme Court decided that a state regulation requiring that a caboose be attached to the rear of every train running throughout the State of Illinois did not constitute an undue burden on interstate commerce. With reference to the Railway Labor Act, *Terminal* provided in pertinent part:

> "The question is *whether the Railway Labor Act, so interpreted, occupied the field to the exclusion of the state action* under review. We conclude that *it does not*. . . . We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question." [Emphasis added].

See also, *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co., supra; In re Chicago North Shore & M. R. Co.*, 147 F.2d 723 (1945).

It should also be noted that when the carriers and the railroad unions reached an impasse as to the number of men to be on a train crew, Congress passed Public Law 88-108 which, in effect, amended the Railway Labor Act to require that such number be determined by binding arbitration. In *Brotherhood of Locomotive Engineers v. Chicago R. I. & P. R. Co.*, 382 U.S. 423 (1966), this Court held that this extension of the Railway Labor Act, which extension had the effect of requiring binding arbitration as to the size of train crews in Arkansas and elsewhere, did not preempt the law of Arkansas which regulated the number of men comprising a crew on an interstate train in Arkansas.

It is not possible to state the the operation and scheme of the federal statute – the Railway Labor Act – precludes

Pennsylvania Act No. 43 from operating within its own field without an actual conflict existing between the two statutes.

Appellants' objection to this conclusion is that the majority in the Pennsylvania Supreme Court below contradicted themselves by stating that the Railway Labor Act was both comprehensive and not comprehensive in its scope. Contrary to this assertion by appellants, the Court below stated, "Thus, there is no pervasive regulation of the field in which Act No. 43 operates . . . ." [Emphasis added, J. S., A14). Obviously, both Act No. 43 and the Railway Labor Act each circumscribe a field of operation. Thus, the Court was expressly referring to the field of operation circumscribed by Act No. 43, not that of the Railway Labor Act. Therefore, no contradiction exists.

A state statute and a federal statute will generally circumscribe *two* fields of operation, regardless of the fact that the federal statute is comprehensive within its own field. This Court stated in *Florida Lime, supra*, 373 U.S. 143 at 144-45:

> "It is true that more recently we sustained a federal statute broadly regulating the production of renovated butter. But we were scrupulous in pointing out that a State might nevertheless – at least in the absence of an express contrary command of Congress – confiscate or exclude from market the processed butter which had complied with all the federal *processing* standards, 'because of a higher standard demanded by a state for its consumers.' A state regulation so purposed was, we affirmed, 'permissible under all the authorities.' Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 162, 62 S. Ct. 491, 499, 86 L.Ed. 754. That distinction is a fundamental one, which illumines and delineates

the problem of the present case. Federal regulation by means of minimum standards of the picking, processing, and transportation of agricultural commodities, however comprehensive *for those purposes* that regulation may be, does not of itself import displacement of state control over the distribution and retail sale of those commodities in the interests of the *consumers* of the commodities within the State. Thus, while Florida may perhaps not prevent the exportation of federally certified fruit by superimposing a higher maturity standard, nothing in Cloverleaf forbids California to regulate their marketing. Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end." [footnotes omitted].

Likewise, the argument that Act No. 43 does not relate to health and safety, and thus must be preempted by the Railway Labor Act, is without merit. Heavy reliance for the health and safety argument is placed upon *California v. Taylor*, 353 U.S. 553 (1957); and *United Air Lines, Inc. v. Industrial Welfare Commission*, 211 Cal. App.2d 729, 28 Cal. Rptr. 238 (1963). Neither case, however, supports such a contention.

Taylor held that a statute denying state employees collective bargaining rights was superseded as to employees of a state-owned railroad by the Railway Labor Act. The state statute before the court in *Taylor* was in direct conflict with the procedures required by the Railway Labor Act, and attempted to substitute alternate procedures in the field specifically regulated by the Railway Labor Act: the settling of labor disputes. Thus, compliance with the California law would have directly and expressly denied railroad employees

the means prescribed by the Railway Labor Act for settling disputes – collective bargaining. Here, compliance with Act No. 43 in no way precludes or interferes in any way with the use of collective bargaining. As stated clearly, with strength and logic in the dissenting opinion of the Commonwealth Court below (J.S., A36-37):

> "Act No. 43 does not interfere with the expressed purposes of the Railway Labor Act and in no way affects the means by which agreement may be reached between parties with respect to wages, hours, or working conditions. Even in situations where the statute is effective, the parties are still free to bargain over the matter of pay periods and are not compelled to reach any particular agreement thereon, and the statutory pay period can be changed or continued in effect by agreement of the parties.
>
> "Act No. 43, it seems to me, does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Railway Labor Act, and this interpretation is in no way in conflict with the reasoning in *Detroit and Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142 (1969). That case was not concerned with retaining the status quo *per se* as applied to working conditions but only with obliging the parties not to change the status quo while the procedures of the Railway Labor Act for settling disputes were being exhausted. As such, that policy retained the act's primary objective, *i.e.*, the prevention of strikes, an objective that will not be affected by the operation of Act No. 43."

In *United*, the Supreme Court of California found that a state law requiring that airlines pay for stewardess uniforms violated the collective bargaining requirement of the Railway Labor Act. The state law before the court in *United* provided as follows:

> "No employee shall be required to contribute directly or indirectly from wage for the purchase or maintenance of uniforms. The term 'uniform' includes wearing apparel and accessories of distinctive design or color required by the employer to be worn by the employee as a condition of employment." 8 Cal. Admin. Code § 11460(9)(a).

The California law under question in *United* nowhere expressly provided that it *not* be applicable if it conflicted with a labor agreement, as is expressly provided in Act No. 43.

Assuming that the California law was indeed unconstitutional, and we have certain reservations as to this, it did remove the cost of uniform problem completely from the field of labor negotiations. Act No. 43 does not even purport to do this as it expressly provides that *any* solution reached through the machinery of the Railway Labor Act will be legally acceptable in Pennsylvania.

Taylor and *United*, both California cases, show California's bent for deciding all preemption questions on a health and safety basis. However, there are a plethora of cases involving the preemption question which have no direct and indeed no indirect bearing on health and safety. See *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963) (racial discrimination in employment); *International Union v. Russell*, 356 U.S. 634 (1958) (concurrent jurisdiction – unfair labor practices); *Cities Service Co. v. Peerless Co.*, 340 U.S. 179 (1950) (minimum prices

on the sale of local natural resources); *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944) (foreign corporation's right to bring action in state court).

Perhaps misled by the reasoning in the California cases, appellants would establish a new test for preemption, that if the object of the state law is not to promote either health or safety, it must give way to the federal law whether or not there is any actual conflict.

This would clearly be at odds with *Florida Lime*, which emphasized parenthetically at 144:

> ". . . the maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendence. Specifically, the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern. Many decades ago, for example, this Court sustained a State's prohibition against the importation of artificially colored oleomargarine (*which posed no health problem*), over claims of federal preemption and burden of commerce." *Plumey v. Massachusetts*, 155 U.S. 461 (1894). [Emphasis added].

The scheme and operation of the Railway Labor Act cannot be said to preclude the operation of Act No. 43 without actual conflict.

B. **Supremacy**

This Court in *Perez v. Campbell*, 402 U.S. 637, 644 (1971), delineated the test to be applied where state law is thought to be in conflict with federal law:

> "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."

Contrary to the railroads' position and Judge Roger's observation in the Commonwealth Court below [J.S., 9-10], the test is not whether the federal and state laws *might be* in conflict, but rather, whether or not they actually *are* in conflict.

If the railroads urge that a conflict is created by the *effects* of the two statutes, then they present this Court with a frivolous issue, as noted above. However, if these railroads urge that a conflict of *purposes* is created, then they present an argument of even less merit.

In enacting the Railway Labor Act, Congress "produced its machinery for conciliation, mediation, arbitration, and adjustments of disputes. A primary purpose of this machinery of railway government is to avoid any interruption to commerce or to the operation of any carrier engaged therein." *California v. Taylor, supra*, at 566.

The objectives and operation of the Railway Labor Act were also summarized in *Terminal Ass'n. v. Trainmen, supra*, 318 U.S. at 5:

> "The purpose of this Act is declared to be to provide 'for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions'. It places upon carriers and employees the duty of exerting every reasonable effort to settle these disputes by agreement, and prohibits the carrier from altering agreed rates of pay, rules or working conditions except in the manner provided by the agreement or by the Act itself. Machinery is set up for the adjustment, mediation, and arbitration of disputes which the parties do not succeed in settling among themselves."

Thus, the primary purpose of the Railway Labor Act is to provide a means – collective bargaining – by which agreement on disputes concerning rates of pay, rules or working conditions may be settled promptly in order to avoid an interruption of interstate commerce. Act No. 43 provides in relevant part:

> "*Unless otherwise stipulated in the contract of hiring or in the applicable labor agreement*, every common carrier by railroad or corporation or joint stock association operating a steam, electric or diesel surface railroad, or engaged in the sleeping car business, or carrying on the business thereof by lease or otherwise, shall pay once each week, to each employee, the wages earned for the seven-day period ending not more than fourteen days prior to such payment." [Emphasis added].

The Act, on its face, is totally inoperative if "a labor agreement" is applicable. Thus, Act No. 43 acknowledges the superiority of the Railway Labor Act and gives way to the collective bargaining prescribed by the Railway Labor Act.

In *California v. Taylor*, at 560 the Supreme Court said:

> "effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules and working conditions."

Under Act No. 43 railroad employees and railroads still have the right to bargain as to pay periods. If they do so bargain and reach agreement, Act No. 43 will give way and not be operative.

Compliance with the provisions of Act No. 43 does not result in conflict with the Railway Labor Act unless it interferes with the *procedures* by which employer/employee agreements are to be reached, for the Railway Labor Act was not intended to preempt the field of regulation of working conditions themselves.

Thus, Act No. 43 does not interfere with the express purposes of the Railway Labor Act. Act No. 43 in no way affects the *means* by which agreement may be reached between parties with respect to wages, hours, or working conditions. Even in situations where the statute is effective, the parties remain free to bargain over the matter of pay periods. They are not compelled to reach any particular agreement thereon, and the statutory pay period can be changed or continued in effect by agreement of the parties.

The only conceivable conflict which could arise between Act No. 43 and the Railway Labor Act must fall within the extended scope given to the latter by this Court in *Detroit & T. S. L. R. R. v. United Transportation Union*, 396 U.S. 142 (1969). In that case, this Court declared that the Railway Labor Act requires not only compliance with any collective bargaining agreement between the parties, but also requires

preservation of the "actual objective working conditions which were in effect prior to the time the dispute arose and which are involved in or related to that dispute."

However, the "actual objective working conditions which were in effect prior to the time the dispute arose" did not arise out of practice, custom, or implied agreement, but were supplied by another Pennsylvania statute – the Act of 1913, *supra*. Appellants are apparently quite willing to abide by the Act of 1913 which is strikingly similar to Act No. 43. The Act of 1913 provides in relevant part:

> "Unless otherwise stipulated in the contract of hiring, each person, firm or corporation employing any person other than at an annual salary, shall pay to such person his or her earnings or wages semi-monthly. The first payment shall be made between the first and fifteenth day of each month, and the second payment shall be made between the fifteenth and the last day of each month. 1913, April 24, P.L. 114 § 1."
>
> "Nothing in this act shall prohibit the payment of wages or earnings oftener than semi-monthly. 1913, April 24, P.L. 114 § 3."

We point out that the only difference between the two statutes (Act. No. 43 and the Act of 1913) is simply 8 days.

There is no conflict between the Railway Labor Act, and Pennsylvania Act No. 43 or the similar Pennsylvania 1913 Act which these appellants and the railroads in Pennsylvania have complied with over the years.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depends do not present a substantial federal question, and are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Pennsylvania.

Respectfully submitted,

ROBERT P. KANE, *Attorney General*
KATHLEEN HERZOG LARKIN,
Assistant Attorney General
Capitol Annex
Harrisburg, Pa. 17120

GORDON P. MacDOUGALL,
Special Assistant Attorney General
1100 17th Street, N.W.
Washington, D.C. 20036

THOMAS P. SHEARER
711 Frick Building
Pittsburgh, Pa. 15219

Attorneys for Commonwealth of Pennsylvania and United Transportation Union

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